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In the

Supreme Court of the United States

October Term, 1963

No. 697

REYNOLDS METALS COMPANY, a corporation, and HENRY W. SHOEMAKER,
Petitioners,

v.

JULIUS LAMPERT and EVELYN LAMPERT, husband and wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now REYNOLDS METALS COMPANY, a corporation, and HENRY W. SHOEMAKER, and respectfully pray that a writ of certiorari issue to review the Judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case by the Court of Appeals on March 18, 1963, and November 15, 1963.

OPINIONS BELOW

The United States District Court for the District of Oregon did not render a written opinion.

The opinion of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the United States District Court for the District of Oregon with respect to the question of punitive damages is reported at 316 F 2d 272 and is appended hereto at pages 36 to 42.

The opinion of the United States Court of Appeals for the Ninth Circuit after rehearing, affirming its original opinion, is appended hereto at pages 43 to 47.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was dated March 18, 1963, and was entered on the same date.

June 13, 1963, an order of said court was entered granting a petition for rehearing. The second judgment of said court was dated November 15, 1963, and was entered on the same date.

This court has jurisdiction to review the judgment in question by writ of certiorari by reason of 28 USCA, Section 2101(c).

QUESTIONS PRESENTED

1. Is the decision of the United States Court of Appeals for the Ninth Circuit that the subject of punitive damages must be submitted to the jury in this case in conflict with the applicable law of the state of Oregon?

2. Is the decision of the United States Court of Appeals for the Ninth Circuit that the so-called expert testimony of Sigmund C. Schwarz must be admitted in evidence in conflict with the applicable law of the state of Oregon?

STATEMENT OF THE CASE

The chief issue presented by this petition relates to the law of punitive damages in the state of Oregon and the application of such law. Consequently, the statement of the case is limited to those matters required to place this issue in its setting.

A. Summary of Facts

Since prior to 1956, respondents have owned approximately 100 acres of real property located near Troutdale, Oregon. Such real property has been used to raise various agricultural crops, including gladiolus bulbs, bulblets and flowers.

Petitioner Reynolds Metals Company (hereinafter referred to as "Reynolds") has operated an aluminum reduction plant near Troutdale since on or about September 23, 1946. Petitioner Henry W. Shoemaker was manager of this plant during the period from May 1, 1957, until the date on which respondents filed their complaint in this action.

June 30, 1959, respondents filed this action in tres-

pass, contending that their real property had been invaded by gases, fumes and particulates emanating from Reynolds' plant. They sought to recover damages allegedly accruing from such invasions in the years 1957, 1958 and 1959, and $500,000 in punitive damages.

After appropriate pretrial proceedings, the action was tried before the court and a jury on February 1, 2 and 5, 1962. The court submitted respondents' claims for compensatory damages to the jury, but withdrew the question of punitive damages from their consideration. February 5, 1962, the jury returned their verdict for respondents in the sum of $10,017, and final judgment was entered thereon the same date.

Petitioners appealed from the judgment of the District Court to the United States Court of Appeals for the Ninth Circuit, raising certain questions which are not before this court. Thereafter respondents filed a cross-appeal, urging that the question of punitive damages should have been submitted to the jury. Their contention was sustained by the Court of Appeals.

Petitioners filed a petition for rehearing on the question of punitive damages, which was granted by the Court of Appeals. On rehearing, the Court of Appeals reaffirmed its original decision.

B. Jurisdiction of United States District Court

This action was filed on or about June 30, 1959, in

the Circuit Court of the State of Oregon for Multnomah County. July 13, 1959, it was removed by petitioners to the United States District Court for the District of Oregon. The jurisdiction of the District Court was properly invoked and the action properly removed under the provisions of 28 USCA, Section 1441, for the reason that the District Court had original jurisdiction of the action under 28 USCA, Section 1332. This jurisdiction obtained because the parties were citizens of different states and the amount of the controversy exceeded the sum of $10,000, exclusive of interests and costs.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioners submit that this court should review the decision of the United States Court of Appeals for the Ninth Circuit for the following reasons:

I

The decision of the Court of Appeals that the subject of punitive damages must be submitted to the jury in this case conflicts with the applicable law of Oregon on an important state question.

II

The decision of the Court of Appeals that the "expert" testimony of Sigmund C. Schwarz is competent and must be admitted in evidence conflicts with the

applicable law of Oregon on an important state question.

ARGUMENT

I

The decision of the Court of Appeals that the subject of punitive damages must be submitted to the jury in this case conflicts with the applicable law of Oregon on an important state question.

As this is a diversity case, the Court of Appeals was bound by the applicable state law.

> *Erie R. Co. v. Tompkins* (1938)
> 304 US 64, 82 L ed 1188.

The court was therefore required to determine and apply the law of the state of Oregon with respect to punitive damages.

In its original opinion, affirmed on rehearing, the court reached the following conclusion as to the Oregon law of punitive damages (infra, pages 41-42):

> "To justify an award of punitive damages, it is not necessary that the act have been done maliciously or with bad motive." (316 F2d 275)

Based upon this theory of the law, the court concluded that the question of punitive damages should have been

submitted to the jury, as the latter could have found, that petitioners acted (1) with wanton disregard of respondents' property rights or other aggravating circumstances, (2) recklessly, so as to imply a disregard of social obligations or (3) with other improper motive (Opinion on Rehearing, infra, page 45). This decision is based upon an erroneous concept of the principles enunciated by the Oregon Supreme Court. As such, it is in irreconcilable conflict with the law of Oregon on an important state question.

A. Under Oregon law, punitive damages may be awarded only in aggravated cases of malice, fraud or gross negligence.

Consideration of the Oregon cases must commence with an examination of the policy enunciated by the Oregon Supreme Court. The declarations of that court reveal that the doctrine of punitive damages is not favored in the law. Consequently, the court restricts rather than extends the types of cases in which such damages are allowed.

Cavs v. McDaniel et al (1955) 204 Or 419, 436-437, 283 P2d 658, 661

> "Punitive damages are not a favorite of the law. The primary concern of the law is the payment of just compensation for the wrong done. Although in proper cases punitive damages are allowable, nevertheless, the tendency of the courts is to restrict rather than to extend their allowance."

And the doctrine is limited strictly to the area delineated by precedent.

Perez v. Central Nat'l Ins. Co. (1958) 213 Or 107, 110, 332 P2d 1066, 1067

> "The doctrine of punitive damages viewed in the most favorable light is subject to criticism * * * It should not be extended past the point to which our precedents commit us."

The pertinent inquiry is, therefore, as to the point to which Oregon precedent extends.

When describing the area in which punitive damages are recoverable, it is of foremost importance to note that *the Oregon courts have never permitted such damages to be awarded in any case involving conduct of the type now before the court.* The reason for this fact is disclosed by the Oregon cases. Such an award would extend beyond the purview of the principles relative to punitive damages established by those cases.

One of the few Oregon Supreme Court cases involving punitive damages for trespass is

Huber et ux. v. Portland Gas & Coke Co. (1929) 128 Or 363, 274 Pac 509

In that case, the court stated (128 Or 368-369, 274 Pac 511):

"Now, taking up the question of punitive damages, we have read the complaint with care in order to ascertain whether it states facts upon which a judgment for punitive damages might be based; but we find nothing in the record in support of the plaintiffs' contention for the recovery of such damages. See the recent case of Gill v. Selling, 125 Or 587 (267 Pac. 812), where this question is determined. That the defendant wrongfully entered upon the premises in plaintiffs' possession is evident; but there is no allegation to warrant a finding that in so doing the defendant acted with malice."

The meaning is clear. In order to recover punitive damages for trespass, a plaintiff must show that the defendant acted with malice or bad motive.

The holding of the *Huber* case is consonant with the Oregon authorities involving punitive damages in fields of the law other than trespass. For example, see,

Martin v. Cambas (1930) 134 Or 257, 261, 293 Pac 601, 603

"* * * Exemplary, punitive or vindictive damages involves the blending of the interests of society in general with those of the aggrieved individual in particular. The generally accepted doctrine is that such damages are awarded by way of punishment to the offender and as a warning to others, or, according to some authorities, by way of example: * * * It is essential in order to warrant a recovery of exemplary damages that there be present in the circumstances some element of malice, fraud or gross negligence; otherwise, the measure of dam-

ages is such an amount as will constitute a just and reasonable compensation for the loss sustained, and nothing more: * * * "

Of particular significance on this subject are the following Oregon cases, which, like the case at bar, involve so-called "intentional torts":

Cays v. McDaniel et al (1955) 204 Or 449, 283 P2d 658

This was an action brought to recover damages for fraud and deceit. The court held that the record did not provide a basis for awarding punitive damages. In this connection, it stated (204 Or 457, 283 P2d 661-662):

"* * * It is quite well established by the authorities that punitive damages are not allowable in cases of simple fraud; to be allowable, the fraud must be an aggravated one, as where it is gross, malicious, or wanton. * * *

"We are of the opinion, therefore, that punitive damages are not recoverable in an action of damages for fraud and deceit, unless the fraud is accompanied by extraordinary or exceptional circumstances of aggravation, clearly indicating malice and willfulness."

Alvarez v. Retail Credit Ass'n (1963) 76 Or Adv Sh 671, 381 P2d 499

This was an action to recover damages for wrongful institution of a civil action and attachment of the plain-

tiff's wages. The court stated (76 Or Adv Sh 675-676, 680, 381 P2d 502-503, 504):

"There is, however, another reason why the case must be reversed. Equal in importance to a plaintiff's proof of a want of probable cause in a case of this character is the necessity that he prove malice on the part of the defendant. At the close of the evidence, the defendant moved for a directed verdict on the ground that the plaintiff had failed to prove malice as a separate element of his case. The trial court denied the motion, but did withdraw from the consideration of the jury the plaintiff's demand for punitive damages. If punitive damages were properly withdrawn, we then have the question whether, in this state, one who litigates wrongfully can be so free of malice that punitive damages properly may be withdrawn without at the same time being so free of malice that the entire cause of action must be withdrawn.

"In withdrawing punitive damages, the trial court recognized that the evidence was wholly barren of proof tending to show that the defendant in suing Alvarez had been actuated by ill will or other improper motive. See Restatement, 3 Torts 451, § 670, and 4 Torts 554, § 908. (The Restatement does not use the word malice to describe the kind of motives that make the aggravated wrong one for which punitive damages may be allowed, but these differences in nomenclature need not detain us in the case at bar.) We agree with the trial court that this was not a case for punitive damages.

"In this state, if there is enough evidence of want of probable cause and of malice to go to the jury at all, then the element of punitive damages must remain in the case. If there is not enough independent evidence of malice to warrant punitive damages,

then the trial court should withdraw the entire case, rather than the prayer for punitive damages only."

The Court of Appeals attempted to dispose of the *Alvarez* case on rehearing by stating (infra. page 13):

". . . it recognizes that there may be 'other improper motives' than ill will 'that make the aggravated wrong one for which punitive damages may be allowed.'"

The case does not, however, support this statement. Rather, it expressly indicates that there must be independent evidence of *malice* to warrant an award of punitive damages.

And see

Lukas v. J. C. Penney Company (1963) 76 Or. Adv Sh 147, 164, 378 P2d 717, 725

These cases demonstrate that the degree of willfulness required in order to render an individual liable for an intentional tort such as libel, malicious prosecution or trespass is not the equivalent of the malice or bad motive required to impose punitive damages for those torts. That fact was noted by the Court of Appeals in an opinion rendered shortly before the decision in the case at bar.

Lundgren v. Freeman (CA 9, 1962) 307 F2d 104

One cause of action asserted by the plaintiff in this case was against certain architects for willfully and wrongfully inducing breach of two contracts between the plaintiff and a school district. In this connection, the court stated at page 119:

> "To summarize, we hold that insofar as architects acted as agents or quasi-arbitrators, Lundgren has elected his remedy and cannot now recover from them any of the damages passed upon by the arbitrators, whether allowed or disallowed by them. If Lundgren asserts that the judgment against school district is uncollectible, he can then recover only that part of the damages involved in the arbitration that he can prove to be the result of wilful and intentional misconduct by architects, which is enough if architects were acting as agents, or were also intended to injure him, which is required if architects were acting as quasi-arbitrators. If Lundgren can prove that architects did anything to his damage that was not within the scope of their authority as agents or quasi-arbitrators, he can recover such damages as naturally flow from that action. As to such action, he need only show that it was wilful and intentional; he need not show a specific intent to injure him. Loss of credit standing and damage to his reputation as a builder may be within the damages recoverable, if it can fairly be said that, under the circumstances, such damages were reasonably foreseeable. If requisite malice is shown, punitive damages may follow."

In the case at bar, the Court of Appeals relied upon

Fisher v. Carlin (1959)
219 Or 159, 346 P2d 641

and

Hall v. Work (1960)
223 Or 347, 354 P2d 837

Its reliance was, however, misplaced. Under the facts of those cases, both confirm the rule that punitive damages are to be awarded only if the defendant acted with malice or bad motive.

Hall v. Work was an action for conversion of an automobile purchased under a conditional sales contract. Because of the plaintiff's breach of contract, there was a close question of fact as to whether the defendant had converted the automobile. The court held that a judgment for punitive damages was properly set aside, stating (223 Or 364, 354 P2d 845):

> "• • • Whether or not a conversion existed became a close question of fact. The evidence is devoid of a showing that defendant was actuated by malice, improper motive or wilfull or wanton disregard for plaintiff's rights."

The circumstances of *Fisher v. Carlin* were so flagrant as readily to show existence of malice or bad

motive. The parties in that case were neighbors. The plaintiff owned certain decorative trees. The defendants desired that the same be trimmed, but the plaintiff refused permission. Nevertheless, the defendants' agents entered the plaintiff's property, topped the trees and cut off one tree four feet from the ground. In the course of this work, the plaintiff's fence was broken and a post knocked down. In addition, tree limbs were left strewn about her yard. The court stated (219 Or 162, 346 P2d 643):

> "* * * The Carlins had been clearly notified on many occasions that the Fishers did not intend to let their trees be cut. In spite of this, they hired a tree surgeon and instructed him to cut the trees so that they would have their view. No care was taken to respect property lines or to carefully determine the location of the Fisher property. When Mrs. Fisher discovered that the trees were being trimmed, she protested to the men doing the work. The man in charge consulted Mrs. Carlin and was told 'to go ahead with your work.'"

It would be difficult to locate a case which would more certainly require punishment of the defendants and a warning to others to desist from similar conduct. This case unquestionably falls within existing Oregon precedent as to punitive damages.

The Oregon law was correctly summarized by the Court of Appeals shortly before it decided this case.

Lundgren v. Freeman (CA 9, 1962) 307 F2d 104, 119

> "Although Oregon allows recovery for exemplary damages, recovery is limited to cases where there is so great an element of malice, fraud, or gross negligence that the court feels the offender should be assessed additional damages by way of punishment and as a warning to others. (Martin v. Cambas, 1930, 134 Or. 257, 293 P. 601; Cays v. McDaniel, 1955, 204 Or. 449, 283 P.2d 658). Exemplary damages, however, can never constitute the basis of a cause of action. (Martin v. Cambas, supra, 1930, 134 Or. 257, 293 P. 601; Weaver v. Austin, 1948, 184 Or. 586, 200 P.2d 593.)"

In the case at bar, however, the court extended the doctrine of punitive damages beyond this point, contrary to the law and policy expressed by the Oregon Supreme Court. Under Oregon law, punitive damages cannot be awarded unless there was aggravated conduct in the form of malice, fraud or gross negligence, requiring punishment of the defendant and a warning to others. In failing to follow the principles enunciated by the Oregon Supreme Court, the Court of Appeals violated the rule of

> *Erie R. Co. v. Tompkins* (1938) 304 US 64, 82 L ed 1188

B. The facts of this case as a matter of law negate the existence of malice or bad motive permitting an award of punitive damages.

In concluding that the jury might have found that petitioners' conduct warranted an award of punitive damages, the Court of Appeals relied upon the following "facts" (infra, pages 45-46):

> 1. Petitioners had knowledge that fluorides from their plant had caused injury to gladiolus grown on respondents' property in every year since 1949.
>
> 2. In 1957, petitioners increased their production, thus also increasing the amount of escaping fluorides.
>
> 3. The excluded testimony of Paul R. Martin with respect to an alleged conversation with petitioner Shoemaker on the subject of controls.[1]
>
> 4. The so-called "expert" testimony of Sigmund C. Schwarz relative to possible controls, which was excluded by the trial court.[2]

In relying upon the foregoing, the Court of Appeals overlooked the significant fact which demonstrates that petitioners did not act with malice or bad motive. This fact is that in using its property for the lawful purpose of operating an aluminum reduction plant, Reynolds takes every feasible precaution to protect others. Under the circumstances, petitioners' conduct as a matter of law would not justify an award of punitive damages.

1. Petitioners offered Mr. Shoemaker's testimony as to the alleged conversation. He unequivocally denied making the statement attributed to him by Mr. Martin (Tr. 344-345).

2. As petitioners hereinafter demonstrate (infra, pages 28-34), the decision of the Court of Appeals that this testimony should have been admitted was also an error which warrants the granting of certiorari in this case.

Before proceeding to a specific discussion of the evidence in this case, it is well to note the authorities which have considered and rejected the doctrine of punitive damages in situations involving lawful use of real property for an industrial enterprise.

Tidewater Oil Company v. Jackson (CA 10, 1963) 320 F.2d 157

This was a diversity action brought by the holders of a Kansas oil and gas lease (the Jacksons) against an adjoining leaseholder (Tidewater) to recover damages for the wrongful flooding of the Jacksons' leasehold.

Water flooding was a legally and scientifically accepted method of producing oil and gas by introduction of foreign water into an oil-bearing formation. Acting under permissive order of the Kansas Corporation Commission, Tidewater injected water into six of its wells, and this water flooded eight of the Jacksons' wells.

In reversing a judgment for punitive damages, the Court of Appeals stated at page 165:

> . . . Kansas follows the general rule which permits an award of damages in addition to compensatory or nominal damages by way of punishing the wrongdoer for 'willful and wanton invasion of the injured party's rights,' and the burden is sustained by a showing of 'such gross neglect of duty as to evince a reckless indifference of the rights of others.' Watkins v. Layton, 182 Kan. 702, 324 P.2d 130; and see also Corwine v. Maracaibo Oil Explora-

tion Corporation, 184 Kan. 151, 334 P.2d 419; and Restatement of Torts, § 908.

The judgment for punitive damages in Corwine v. Maracaibo Oil Exploration Corporation, supra, was based upon a violation of the same statute which formed the legal basis for the compensatory judgment in Polzin v. National Co-Op. Refinery Ass'n, supra, but unlike either Corwine or Polzin, the acts complained of here, and which form the basis for both compensatory and punitive judgments, were committed under color, and in accordance with, Kansas law and, while they were wrongful and actionable in the common law sense, they were, as we have seen, lawfully undertaken and lawfully done, in the interest of conservation. While we cannot know the attitude of the Kansas court in circumstances like this, we venture to forecast that, when it does speak, it will not punish a common law wrongdoer for a legalized trespass or nuisance."

Berg v. Reaction Motors Div., (1962) 37 NJ 396, 181 A2d 487

This was an action brought to recover damages to property resulting from the defendant's testing of a rocket engine for a supersonic airplane.

On the question of punitive damages, the court stated (37 NJ 414-415, 181 A2d 496-497):

"It may well be that the defendant could have exercised greater care and diligence, perhaps in the selection and arrangement of the testing sites and stands, in the development of the sound suppressor, and in the course of its other activities. But that

would merely indicate negligence and would be a far cry from the plaintiffs' charge of deliberate conduct with knowledge of high probability of harm and reckless indifference to consequences. After it began its testing, the defendant took sound decibel readings and received favorable reports from its seismographic consultant and its consultant in sound levels. Its representatives met repeatedly with the complainants and local officials and it agreed to undertake various steps to alleviate the complaints. It eliminated excess ammonia fumes through the installation of a burner, it curtailed testing hours until the Air Force insisted that it step up its program, and it agreed to an informal arrangement for the submission and determination of claims. It initiated steps to ascertain the feasibility of a sound suppressor, constructed and tested a miniature device for sound suppression, and submitted a comprehensive proposal to the Air Force for approval. It met with school officials and arranged a test which evidenced no structural damage to the school. Throughout all of the foregoing, it acted, so far as the record before us shows, in good faith and in the conscientious endeavor to lessen the danger of damage and inconvenience to its neighbors. While we are clear that it was fairly held accountable for the structural damage it actually caused, there would be no justice in punishing it through the imposition of smart money. * * * The defendant's motion to strike the claims for punitive damages should have been granted, and, accordingly, the award of damages beyond compensation is vacated."

Rock Island Oil & Refining Co. v. Marney (1953) 208 Okla 259, 255 P2d 234

This was an action to recover damages for loss of

livestock allegedly caused by pollution of a stream by defendants' oil refineries. The evidence showed that the defendants had invested large sums to obtain equipment to run off effluent water, and that the method they employed was the best known to the industry. Although they did not deliberately permit oil or refinery waste to escape, some was lost on several occasions.

On the question of punitive damages, the court stated: 208 Okla 263-264, 255 P2d 238-239:

> "• • • The evidence is without contradiction that no effluent water carrying refinery waste was deliberately or knowingly permitted to empty into Cow Creek. It was shown that the embankments of the pits, or ponds, were broken on two occasions by reason of very heavy rains, which caused their contents to drain into Cow Creek. Furthermore, it is shown that when the Game Ranger and others visited the refineries to ascertain the cause of the pollution of Cow Creek, the officials of the plants stated that they were glad to work with landowners upon the creek to prevent pollution, and that they would investigate any claim of pollution or run down the source thereof and see if it could be avoided. On another occasion, Mr. Coleman, a member of the House of Representatives, accompanied several landowners upon an inspection trip of the refineries to ascertain the cause of pollution, and in a conversation with a representative of Sunray they were advised that the break of a dike caused the stuff to get away; they were also advised by the same representative of Sunray that the company had procured additional land for larger vats or ponds for the impounding of refinery water.
>
> "In our view of the case the record does not disclose such gross negligence in the operation of the

defendants' refineries and such disregard of plaintiffs' rights as to amount to an evil intent or gross negligence to sustain exemplary damages. The record must establish fraud, malice, oppression or gross negligence. No competent evidence was adduced to show that defendants committed any overt act to come within the announced rule."

Laurel Equipment Co. v. Matthews (1953) 218 Miss 718; 67 So2d 258

This was an action to recover damages for alleged negligent distribution of paint from the defendant's paint shop onto the plaintiffs' adjacent premises.

The court stated (218 Miss 722-723, 67 So2d 260):

"• • • In view of the proof that the painting was done in accordance with approved methods, and that on the only occasion when a complaint was made to the responsible head of the business, he endeavored diligently to correct the trouble, the Court deems the proof in this case insufficient to show either a willful and intentional wrong, or such gross and reckless negligence as is, in the eyes of the law, the equivalent of willful wrong. • • • It is our conclusion from the whole evidence, that the court should not have submitted the issue of punitive damages to the jury and that the award therefor must be set aside and nullified."

The undisputed evidence in the case at bar shows that Reynolds took every feasible precaution to protect others who might be injured in the course of its legitimate use of its property. Thus, the agreed facts of the Pre-Trial Order show the following (R. 127-128):

"Before defendant Reynolds Metals Company commenced operating said plant on September 23, 1946, said defendant had installed in the vents along the roofs of the potline buildings water pipes and spray heads for the purpose of precipitating a portion of the gases, fumes and particulate including fluorides, passing out of said vents. The cost of installing such system was approximately $271,846.

"On or about June 1, 1949, defendant Reynolds Metals Company commenced the construction and installation of a different gas, fume and particulate collecting system at said plant. The installation of this system was completed on or about November 3, 1950. This system consists of hoods for all pots in said plant, the connection thereof, to an induced-draft system for the removal of gases, fumes, and particulates from said pots, dust collectors and wash towers for the capture of the gases, fumes and particulates passing into the induced-draft system before the release thereof into the air, and roof scrubbers for the capture of gases, fumes and particulates not drawn into the induced draft system and for washing of the same. The cost of installing such system was approximately $2,139,185."

The reason for the change made in 1949 and 1950 was described as follows (Tr 167):

"MR. ANDERSON: Q Why were those controls put on in 1950?

"A Well, the company was looking for an improvement in the fume-collection system. The original system that was put into the plant, they figured if there was a possibility of improving it, we would do it, and as a result of some experimental work, this new and better fumes-collection system was installed, and the installation was completed in November of 1950."

Reynolds has also carried on the following activities in an attempt to determine whether effluents from its plant cause damage:

1. It has grown gladiolus plants, trees, berries and bulbs on test plots one-half mile from the plant for a period of eight consecutive years (Tr. 162, 317-321).

2. It has maintained 85 or 90 vegetation sampling stations in an area around the plant extending eight or nine miles east and west and four or five miles north and south. These stations started with 45 to 50 in 1946, and have been gradually increased in number since that time (Tr. 172-173).

3. It tests the atmosphere inside and outside the plant (Tr. 192).

4. It maintains a weather station and weather report records (Tr. 192).

5. It maintains records of all analyses made, including monthly analyses of vegetation on all locations in the Troutdale grid (Tr. 188-189).

Of course, before an issue is submitted to a jury in federal court, the judge must determine whether there is any evidence to support a verdict.

Gunning v. Cooley (1929)
281 US 90, 94, 74 L ed 720, 724

Reitan v. Travelers Indemnity Company (CA 7, 1959) 267 F2d 66, 68

The comments of the trial judge on this subject are, therefore, particularly significant:

"THE COURT: Mr. Anderson, the basis of my ruling excluding the testimony that you sought to elicit from the witness, which you claimed was based upon your desire to obtain punitive damages, was motivated on my part because throughout this case you have been attempting to supplement your evidence of actual damage by appeals to prejudice constantly, and that has been the whole substance of your case.

"Now, under certain circumstances where there is legitimate basis for a claim of punitive damages, we permit evidence to be introduced even though it may have other effects because if evidence is proper, the mere fact that it may prejudice that person is not a valid ground for exclusion. But here we have a number of cases that have been filed against Reynolds Metals Company. I know of none that have permitted punitive damages to be allowed.

"In addition to that, we have here an industry which has been operating for some time, and, on the basis of the testimony that you were able to elicit, indicated a concern for the people in the area by the mere fact that they constantly took these tests. I think your evidence showed 227,000 different reports. People who are oblivious to the welfare of their neighbors ordinarily do not go to the trouble of making all these reports." (Tr. 238-239)

"THE COURT: Mr. Anderson submitted one additional instruction. He asked me to restore the question of punitive damages this morning, which I did not. I have come to the same conclusion that I will not submit it to the jury because if plaintiffs were entitled to have that issue submitted to the jury, I have already erred in excluding some of the testimony.

"So that there will not be any mistake as to the reasons why I excluded the testimony and withdrew this issue from the case, I think I should restate my reasons therefor.

"From the minute the case opened, the plaintiffs have attempted to prejudice the jury. This is permissible if based on admissible evidence, but on a number of occasions they have done this by testimony which has no relevance to any issue in the case other than the desire to prejudice the jury. I am referring not only to the manner in which plaintiffs and each of them have acquired their property but also to the so called expert testimony of growers, which was largely based upon experiences more than ten years ago, witnesses who were encouraged to testify that they had moved out of the area because of their experiences with the Reynolds Company.

"In view of the testimony as to the actual damages I can appreciate why the plaintiffs have attempted to substitute this type of appeal for the evidence that was actually adduced. When a plaintiff pursues such a course, I think that a court must take a good, hard look at the case to determine whether, when the evidence is all in, he will be able to submit the issue to the jury and also determine whether this evidence ostensibly offered on the issue of punitive damages is in reality offered for the sole purpose of prejudicing the jury.

"A number of fumes cases against aluminum companies have been filed. As far as I know, no court has ever granted punitive damages, and in the jury cases I am informed that no such issue was ever submitted to the jury.

"In the offer of proof that was submitted, Mr. Schwarz did not demonstrate the expertise which would entitle him to express an informed opinion on the effects of electrostatic precipitators in an aluminum reduction plant.

"Finally, there was testimony of Mr. Paul Martin who testified as to a conversation with Mr. Shoemaker in which Mr. Shoemaker is alleged to have stated in substance that it was cheaper to pay claims than to install better equipment. Anyone acquainted with Mr. Martin's long and bitter fight against the defendants, the number of claims which he has filed against the company, and his present litigation against the company, cannot take such evidence seriously." (Tr. 349-351)

In the present status of the industry, Reynolds cannot completely prevent the escape of fluorides from its plant. It does, however, exercise every precaution to prevent injury to others which might result from the emission of such fluorides. This type of conduct certainly does not require or warrant punishment or a warning to others. It is not malicious or with bad motive. In fact, even following the Court of Appeals incorrect theory of Oregon law, it is not wanton, reckless or with other improper motive.

Imposition of punitive damages in this case would, therefore, be contrary to Oregon law.

C. The decision of the Court of Appeals as to punitive damages involves an important state question.

Of course, the decision of the Court of Appeals in this case is very important to petitioners and respondents. However, its significance to all the citizens of Ore-

gon and their courts completely transcends the effect upon the parties.

The net result of the Court of Appeals decision is this: Because of a federal court decision contrary to the state law it is required to follow, the Oregon courts will be flooded with punitive damage claims in cases wherein the Oregon Supreme Court does not allow recovery of such damages. Oregon citizens pursuing legitimate activities in a lawful manner with due regard for their neighbors will be harassed by huge claims for punitive damages even though the state court of last resort has declined to impose such liability. The effect upon the judicial processes of the state can only be chaotic.

The significance of this case to the public and to industry is emphasized by the fact that the following corporations filed briefs amicus curiae on rehearing in the Court of Appeals: Aluminum Company of America, Associated Oregon Industries, Inc., Georgia-Pacific Corporation, Harvey Aluminum (Incorporated) and Weyerhaeuser Company.

Without doubt, this case involves an important state question.

II

The decision of the Court of Appeals that the "expert" testimony of Sigmund C. Schwarz is competent and must be

admitted in evidence conflicts with the applicable law of Oregon on an important state question.

In its opinion on rehearing, the Court of Appeals held that the District Court erred when it declined to admit the so-called "expert" testimony of Sigmund C. Schwarz in evidence (infra, page 46). Again, its decision was contrary to the applicable law of the State of Oregon.

Under the provisions of

> Rule 43(a), Federal Rules of Civil Procedure

the competency of witnesses is determined by the law of the appropriate state.

1 Moore's Federal Practice, Section 43.06, page 1331

> "• • • under Rule 43(a) 'the law of the state continues to determine the competency of witnesses."

Consequently, the court in this case was bound by Oregon law.

In Oregon, the right to determine the competency of an expert witness is vested in the sound discretion of the trial judge.

Ritter v. Beals et al (1961) 225 Or 504, 525, 358 P2d 1080, 1089

"The correct rule is that an expert's fitness to answer opinion questions must first satisfy the discretion of the trial judge • • • The decision whether to receive the testimony should be left to the sound discretion of the trial judge."

Highway Com. v. Parker et al (1960) 225 Or 143, 162, 357 P2d 348, 356-357

"As was ruled in the La Grande case, the competency of a witness who is called as an expert is a preliminary matter which is addressed to the sound discretion of the trial judge. • • • This court has not gone so far as to assign completely to the trial judge's province a ruling upon the would-be expert's qualifications, but it has gone far in that direction. • • •"

Tuite v. Union Pacific Stages et al (1955) 204 Or 565, 583-584, 284 P2d 333, 342

"It is firmly established in this state that the propriety of admitting opinion evidence and determining the qualifications of expert witnesses rest largely in the discretion of the trial court, and its determination of either question will not be disturbed on appeal unless there has been a manifest abuse of discretion."

The Court of Appeals was justified in reversing the judgment of the District Court, then, only if the latter manifestly abused its discretion in excluding Schwarz

testimony. In this connection, examination of the record discloses that his qualifications were at best highly doubtful. Thus, although he purported to testify as to the effect of electrostatic precipitators (Tr. 246), he had no acquaintance with the use of such equipment in the aluminum industry specifically or in connection with the capture of fluoride particulates generally (Tr. 251-253.) Rather, his experience was confined to hydrocarbons (Tr. 245-246). He therefore did not have the requisite knowledge or experience in the field under inquiry, and the trial court so found (Tr. 253-256):

> "I might state for the record that the reason why I am rejecting it is that this testimony is not to be used as a basis for bringing in other testimony which the sole purpose and natural effect of which is to prejudice or attempt to prejudice the jury. If you had a witness who had had more experience than this witness has in this particular field, who had developed something, or if you could show that other aluminum plants around the country were using this process, I would let it in. I would let him testify, and I would permit all the other testimony to come in regardless of its tendencies, but, in my view, his statements are unsupported, and I think there is good basis for believing that if this electrostatic process could recapture these fluorine gases, that some of the aluminum companies would have used it. Today we find out, from Mr. Yerke's statement that it is being used at a plant at Wenatchee, Washington, with which this witness is not familiar, and apparently with not very good results."

Of course, in order to qualify as an expert, a witness must have either actual knowledge in the field under consideration or have made sufficient studies to enable him to formulate an opinion.

Hildebrand v. United Artisans (1907) 50 Or 159, 166, 91 Pac 542, 544

> "• • • a physician testifying as such expert must first be shown qualified to do so either by actual experience in cases similar to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own in reference to the matter under consideration."

As Mr. Schwarz did not possess these qualifications, it cannot be said that the trial court abused its discretion in declining to admit his testimony.

The cases cited by the Court of Appeals are not to the contrary. Three of those cases involved a witness having knowledge in the field of his testimony, although no personal experience with the particular product under consideration. In each of these cases, the trial judge had in his sound discretion approved the witness' qualifications and admitted the testimony.

> *John J. Fulton Co. v. Federal Trade Comsion* (CA 9, 1942) 130 F2d 85 (Witnesses with medical and pharmacological knowledge permitted to testify with respect to the drug Cyursin although they had not

fused it in treatment of disease or had not fused it under proper scientific controls.)

Research Laboratories v. United States (CA 9, 1948) 167 F2d 410 (Medical experts permitted to testify with respect to drug Nue-ovo based upon tests of the drug, consensus of medical opinion as to the ingredients of the drug and their personal opinions as to the efficacy of such ingredients.)

Sitta v. American Steel & Wire Div. of U. S. Steel Corp. (CA 6, 1958) 254 F2d 12 (Engineer having experience with cable and wire rope permitted to testify that manufacture of wire rope was defective although he had not seen such rope manufactured.)

In the fourth case, the trial judge excluded the testimony of a witness as to the cause of an airplane accident for the reasons that he had never experienced an accident of the kind involved and was not an "expert who had figured it out mathematically." However, although the witness had no scholastic standing in the science of aerodynamics, he had practical experience and had examined the wreckage and other available factual data. The appellate court held that his testimony should have been admitted.

Bratt v. Western Air Lines
(CA 10, 1946) 155 F2d 850

This case certainly does not apply, as Mr. Schwarz had

neither training nor practical experience on the matter as to which he proposed to testify, that is, electrostatic precipitators as a means of controlling emission of fluoride particulates, especially in the aluminum industry.

Unquestionably, then, the opinion of the Court of Appeals is contrary to the applicable law of Oregon. Furthermore, its decision most certainly involves an important state question. The respective functions of the trial and appellate judges are basic to the jurisprudence of the state. A federal court should not be permitted to lay down a rule contrary to that applied by the Oregon Supreme Court which usurps the rights of the trial judges in conducting trials.

CONCLUSION

Because the United States Court of Appeals for the Ninth Circuit has decided two important questions of Oregon law in a manner which conflicts with the applicable law of that state, petitioners respectfully pray that their petition for writ of certiorari to said court be granted.

Respectfully submitted,

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APPENDIX

Part I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REYNOLDS METALS COMPANY, et al.,
Appellants and Cross-Appellees,

vs.

JULIUS LAMPERT and EVELYN LAMPERT,
Appellees and Cross-Appellants.

No. 17,941
March 18, 1963

Appeal from the United States District Court
for the District of Oregon.

Before: HAMLEY and DUNIWAY, Circuit Judges, and CROCKER, District Judge.

CROCKER, District Judge.

Appellant Reynolds Metals Company operates an aluminum reduction plant near Troutdale, Multnomah County, Oregon. Appellant Henry W. Shoemaker was plant manager at the time of the commencement of the action.

Appellees Julius and Evelyn Lampert own certain real property near Troutdale which they used for growing crops including gladiolus bulbs, bulblets and flowers.

On June 30, 1959, appellees commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah, alleging that their real property had been invaded by gases, fumes and particulates (commonly referred to as fluorides) emanating from appellants' plant and seeking, for the years 1957, 1958 and 1959, the following damages:

1. $3,191.31 as the cost of obtaining substitute real property for growing bulbs (including rent, cost of fertilizer and the cost of travel between the rented property and appellees' own property).

2. $12,500 for being deprived of the use and enjoyment of their real property.

3. $3,020 for damage to gladiolus bulbs.

4. $1,650 for damage to gladiolus blooms.

5. $500,000 in punitive damages.

Appellants removed the action to the District Court on the basis of diversity of citizenship and the requisite jurisdictional amount. The case was tried before a jury and resulted in verdict and judgment for appellees in the amount of $10,017.

Appellants and appellees appeal on the basis of certain alleged errors in the District Court's instructions to the jury, appellants contending that:

1. It was error for the Court to refuse to instruct

the jury that appellees might not recover both damages for loss of use and enjoyment of their real property and damages for expenses incurred by them in obtaining a substitute for such real property.

2. It was error for the Court to refuse to instruct the jury that appellees might not recover travel expense and travel time and to instruct the jury that such damages were recoverable.

3. It was error for the Court to instruct the jury that they were required to return a verdict in favor of appellees of at least nominal damages.

4. Appellees contend in their cross-appeal that the Court erred when it struck and withdrew from consideration of the jury appellees' claim for punitive damages.

Considering these contentions seriatim we hold:

1. The jury was erroneously instructed that appellees could recover damages both for the loss of the use of their property and for the cost of obtaining substitute property. It is clear, and appellees do not seriously dispute, that while recovery may be had for the loss of use of real property, where a substitute can be and is obtained, the measure of damages for the loss of use of the original property is the cost of renting the substitute. See 15 Am. Jur. Damages, Section 129; 4 Restatement of the Law of Torts, Section 931. Appellees, however,

contend that the Court below did not err in refusing to give appellants' proffered instructions for the reason that the instructions referred only to damage to the gladiolus bulbs and plants on the property which appellees own, whereas appellees were entitled to recover also for the damage to the plants on the rented land.

There is no merit to this contention. The court instructed the jury as to appellees' right to recover for the damage done to the gladioli on the rented land. [Transcript p. 360 and 366] Appellants' Requested Instructions 2, 2B and 2C, when read, show clearly that they were designed solely to avoid the possibility of a double recovery resulting from the consideration of both the use value of appellees' land and the cost of renting the substitute land as the measure of damages for loss of use.

There is little likelihood that appellants' instructions would have confused the jury on the issue of appellees' right to recover for the plants injured on rented lands, and one of the instructions should have been given by the Court to the jury.

Appellees next contend that if appellants' requested instructions were given, an element of compensation would have been excluded. They seem to equate loss of "enjoyment," as used in the term "use and enjoyment," with the concept of "annoyance, inconvenience and discomfort," which we will assume would have been a

proper additional element of damage below. See *Quillen v. Schimpf*, 133 Or. 581, 291 Pac. 1009; *Porges v. Jacobs*, 75 Or. 488, 147 Pac. 396; 4 Restatement of the Law of Torts, Section 929.

Appellees, however, did not seek damages for this element in any of their pleadings nor in the pre-trial conference order. Their prayer in this respect comes too late. Moreover, in his instructions, the District Judge seems to have used "use" and "enjoyment" interchangeably, which would tend to mislead the jury.

2. It was proper for the District Court to allow the inclusion of travel time and expense as part of the cost of obtaining the substitute land.

There was apparently no issue as to the possibility that appellees could have rented land nearer to that of their own, thus making the required travel unreasonable. The travel expenses were thus a necessary and reasonable element of the cost of the substitute land; and it is well established that the injured party may recover reasonable expenses incurred in attempting to mitigate the damages resulting from a wrongful act. *Title & Trust Co. v. United States Fidelity & Guaranty Co.*, 138 Or. 467, 7 P.2d 805; *Duncan Lumber Co. v. Willapa Lumber Co.*, 93 Or. 386, 182 Pac. 172; 15 Am. Jur., Damages, Section 147; 25 C.J.S. Damages, Section 49.

3. The Court did not err in instructing the jury that appellees were entitled to nominal damages as a matter of law.

Little need be said on this point. The record shows that appellants conceded that under the law of Oregon (see *Martin v. Reynolds Metals Co.*, 221 Or. 86, 342 P.2d 790) the settling of fluorides from the plant on appellees' property constituted trespass as a matter of law. See also *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312.

4. The District Court erred in withdrawing appellees' claim for punitive damages from the consideration of the jury.

Where there is evidence that the injury was done maliciously *or* wilfully and wantonly, or committed with bad motive or recklessly so as to imply a disregard of social obligations, punitive damages are justified. *Fisher v. Carlin*, 219 Or. 159, 346 P.2d 641.

Here the record discloses that appellants had known for several years that fluorides from their plant were settling on appellees' land, with resultant damage to appellees' crops. It thus could have been found that their trespass was done knowingly and wilfully, that it was intentional and in wanton disregard of appellants' social obligations.

To justify an award of punitive damages, it is not necessary that the act have been done maliciously or

with bad motive. Where it has become apparent, as it has here, that compensatory damages alone, while they might compensate the injured party, will not deter the actor from committing similar trespasses in the future, there is amply justification for an award of punitive damages. *Kingsley v. United Railways Co.*, 66 Or. 50, 133 Pac. 785. See Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173. The appellees have neither abandoned nor waived their claim for punitive damages against appellant Shoemaker. Accordingly, the issue of punitive damages should have been submitted to the jury.

The judgment is reversed and the case is remanded to the District Court for retrial not inconsistent with this opinion.

(Endorsed) Opinion Filed March 18, 1963.

Frank H. Schmid, Clerk.

Part II

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REYNOLDS METALS COMPANY, et al.,
Appellants and Cross-Appellees,

vs.

JULIUS LAMPERT and EVELYN LAMPERT,
Appellees and Cross-Appellants.

No. 17,941
Nov. 15, 1963

Rehearing on Appeal from the United States District Court for the District of Oregon

Before: HAMLEY and DUNIWAY, Circuit Judges, and CROCKER, District Judge.

CROCKER, District Judge.

Appellants, Reynolds Metals Co. and Henry W. Shoemaker, petitioned for rehearing in banc, and were granted a rehearing limited to the question of punitive damages before the panel which heretofore acted in this case.

Motions of several firms for leave to file amici curiae briefs on the question of punitive damages were also granted.

The amici curiae briefs, however, were of little value

as, for the most part, they present matters outside the issues of this case.

To bring this case into proper focus, it should be reiterated:

(1) That jurisdiction in this case is based on diversity of citizenship and that the federal courts must apply the law of the State of Oregon. *Erie R. Co. v. Tompkins* (1938), 304 U.S. 64, 82 L. Ed. 1188.

(2) That the settling of fluorides from appellants' plant on appellees' property constituted trespass as a matter of law in the State of Oregon. *Martin v. Reynolds Metals Co.* (1959), 221 Oregon 86, 342 P.2d 790.

(3) That the Supreme Court of Oregon has said that the jury may award punitive damages if ". . . the injury was done maliciously or willfully and wantonly or committed with bad motive or recklessly so as to imply a disregard of social obligations." *Fisher v. Carlin* (1959), 219 Or. 159, 346 P.2d 641.

In addition, it should be noted:

(1) That in Oregon a jury may award punitive damages if there was "evidence of malice or willful, wanton disregard of the property rights of plaintiff or other aggravating circumstances." *Hall v. Work* (1960), 223 Or. 347, 354 P.2d 837, 366 P.2d 533.

(2) That *Alvarez v. Retail Credit Ass'n. of Portland*,

Oregon, Inc., (1963), 76 Or. Adv. Sh. 671, 381 P.2d 499, cited by appellants, does not overrule *Fisher v. Carlin*. In fact, it recognizes that there may be "other improper motives" than ill will "that make the aggravated wrong one for which punitive damages may be allowed."

(3) That the Oregon legislature has not spoken on this subject.

The decision in this case is that under the law of the State of Oregon and the particular facts in this case, the question of punitive damages should have been submitted to the jury, as the jury could reasonably have found that appellants had acted with wanton disregard of the property rights of appellees or other aggravating circumstances, *or* recklessly so as to imply a disregard of social obligations *or* other improper motive.

The particular facts that lead to this conclusion are:

(1) That appellants had knowledge that fluorides from their plant had caused injury every year since 1949 to gladiolus grown on appellees' property.

(2) That in 1957 appellants increased their production by putting more electricity into reduction cells which almost doubled the amount of escaping fluorides.

(3) That Paul R. Martin testified that on April 23, 1959, Mr. Shoemaker, Manager of appellants' plant, when asked why he didn't use better fluoride controls,

said: "It is cheaper to pay claims than it is to control fluorides." The trial court erroneously instructed the jury to disregard this testimony but only after withdrawing the question of punitive damages from them. The credibility of this testimony was for the jury. *O'Harra v. Puidt*, 210 Or. 533, 310 P.2d 1110 (1957).

4. That if permitted by the trial court Sigmund C. Schwarz would have testified that an electrostatic precipitator operated efficiently would remove 98 to 99 per cent particulate matter.

Mr. Schwarz is a chemical engineer who for 36 years was Chief Chemist and Chemical Engineer for the Gas Co. in Portland, which installed electrostatic precipitators to clear up a serious atmospheric pollution problem. He was qualified in the general field and the trial court abused its discretion in refusing his testimony. His lack of experience with electrostatic precipitators in the aluminum industry was a matter to be considered by the jury in determining his credibility and the weight to be given his testimony. *Bratt v. Western Airlines, Inc.* (1949), 175 F.2d 850; *Sitta v. American Steel & Wire Div. of United States Steel Corp.* (1958), 254 F.2d 12; *John J. Fulton Co. v. Federal Trade Commission* (1942), 130 F.2d 85; *Research Laboratories, Inc. v. U. S.* (1948), 167 F.2d 410.

After rehearing the question of punitive damages,

the original decision in this case that the judgment of the trial court be reversed and the case remanded to the District Court for retrial not inconsistent with the opinion remains the decision of this court.

Endorsed: Opinion Filed Nov. 15, 1963.

Frank H. Schmid, Clerk.